Ranjit Singh a/l Taram Singh v Quah Poh Keat & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–862 OF 2006
AZIAH ALI J
4 JANUARY 2008

Legal Profession — Discharge of solicitor — Conflict of interest — Disqualification of legal firm from acting as solicitors — Solicitors involved in process leading to exclusion of plaintiff from partnership — Whether solicitors were material witnesses — Whether material or disputed facts existed — Whether accepting brief may result in difficulty to maintain professional independence — Legal Profession (Practice and Etiquette) Rules 1978, rr 5(a) & 28(a)

The plaintiff filed an application to disqualify the legal firm, Messrs Lee Hishammuddin Allen & Gledhill (LH-AG) from acting as solicitors for the defendants in this action. The plaintiff was at all material times a partner in a firm known as KPMG. The plaintiff instituted this action against the defendants for unlawfully and illegally excluding the plaintiff from the partnership of KPMG. The action taken by the defendants against the plaintiff stemmed from an allegation of sexual misconduct made by one female employee of the defendants against the plaintiff. LH-AG advised the defendants on this matter. The plaintiff alleged that the procedures, acts and conduct undertaken by the defendants in removing him from the partnership were unlawful and illegal. The reasons put forward by the plaintiff for this application were that the firm of LH-AG had been fully involved in all processes leading to the exclusion of the plaintiff. The plaintiff contended that two solicitors from LH-AG had been actively involved in the plaintiff's fate, the first being one Lim Heng Seng ('Lim'), a partner in LH-AG, who was supposed to have sat through during the defendants' executive committee meeting where the allegation of misconduct were aired against the plaintiff. The second being one Datuk Naban, senior partner in LH-AG, who had told the plaintiff 'to pack his bags and leave' the partnership. The plaintiff thus alleged that since the two solicitors from LH-AG were material witnesses in the suit, a conflict of interest arose that should disqualify the legal firm from acting as solicitors for the defendants.

Held, allowing the plaintiff's application with costs:

(1) The plaintiff's association with Datuk Naban and LH-AG was strictly

on a professional basis. The plaintiff himself stated that he had a cordial, close working relationship with Datuk Naban. There was no evidence to suggest that there existed between the plaintiff and Datuk Naban or between the plaintiff and LH-AG the situation as envisaged by r 5(b) of the Legal Profession (Practice and Etiquette) Rules 1978. Therefore, the nature of the cordial, albeit close, working relationship between the plaintiff and Datuk Naban or his relationship with LH-AG did not fall within the context of r 5(a) (see para 8).

(2) The defendants' decision to exclude the plaintiff from the partnership arose out of allegations made against the plaintiff. These allegations formed the basis for the defendants' action. It was reasonable to presume that the action against the plaintiff would not have been taken unless the defendants' were satisfied as to the validity of the allegations made against the plaintiff. It was also reasonable to presume that the defendants' action against the plaintiff reflected the advice given to them by LH-AG. The facts upon which action was taken against the plaintiff by the defendants were material facts and these are disputed facts (see para 10).

(3) As a result of the meeting and discussion between the plaintiff and Datuk Naban and by giving the 'friendly' advice that the plaintiff should leave KPMG, Datuk Naban made known his stand as to both the allegations made and the plaintiff's position in KPMG. By his act, Datuk Naban became personally involved and he was likely to be a witness of material and disputed facts (see para 13).

(4) It could not be ignored that Datuk Naban was a senior partner in LH-AG, a position that was high in LH-AG's organisational hierarchy. Mr Lim, Mr Lambert Rasa-Ratnam and Mr Sean Yeow were the partners of the said firm. The retainer here was LH-AG, not Mr Lambert Rasa-Ratnam and/or Mr Sean Yeow. The proximity and relationship between Datuk Naban and counsel in LH-AG thus raised a situation of conflict of interest (see para 14).

[Bahasa Malaysia summary

Plaintif telah memfailkan permohonan untuk membatalkan firma guaman, Tentuan Lee Hishammuddin Allen & Gledhill (LH-AG) daripada bertindak sebagai peguamcara kepada defendan-defendan di dalam tindakan ini. Plaintif pada waktu material merupakan rakan kongsi dalam firma dikenali sebagai KPMG. Plaintif memulakan tindakan terhadap defendan-defendan yang secara tidak sah dan menyalahi undang-undang telah menyingkirkan plaintif daripada perkongsian KPMG. Tindakan yang diambil oleh defendan-defendan terhadap plaintif bermula daripada tuduhan salah laku seksual yang dibuat oleh seorang pekerja perempuan defendan-defendan

terhadap plaintif. LH-AG menasihatkan defendan-defendan mengenai perkara tersebut. Plaintif mendakwa bahawa prosedur-prosedur dan tindakan-tindakan yang dijalankan oleh defendan-defendan untuk menyingkirkannya daripada perkongsian adalah tidak sah dan menyalahi undang-undang. Alasan-alasan yang dikemukakan oleh plaintif untuk permohonan ini adalah bahawa firma LH-AG telah terlibat sepenuhnya dalam semua proses-proses yang membawa kepada penyingkiran plaintif. Plaintif menegaskan bahawa dua peguamcara dari LH-AG telah terlibat secara aktif dalam menentukan nasib plaintif iaitu yang pertama, Lim Heng Seng ('Lim'), seorang rakan kongsi dalam LH-AG, yang menghadiri mesyuarat jawatankuasa eksekutif defendan-defendan di mana tuduhan salah laku plaintif dikemukakan. Yang kedua ialah Datuk Naban, rakan kongsi kanan dalam LH-AG, yang telah memberitahu plaintif untuk 'mengemaskan beg dan meninggalkan' perkongsian. Oleh itu plaintif mendakwa bahawa memandangkan kedua-dua peguamcara daripada LH-AG merupakan saksi material dalam perbicaraan, kepentingan bercanggah yang akan timbul seharusnya membatalkan firma guaman daripada bertindak sebagai peguamcara kepada defendan-defendan.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Perhubungan plaintif dengan Datuk Naban dan LH-AG adalah semata-mata atas dasar profesional. Plaintif sendiri menyatakan bahawa dia mempunyai hubungan yang mesra dan rapat dengan Datuk Naban. Tiada bukti yang menunjukkan bahawa wujud antara plaintif dan Datuk Naban atau antara plaintif dan LH-AG keadaan yang dibayangkan oleh k 5(b) Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978. Oleh itu, hubungan kerja yang mesra dan rapat antara plaintif dan Datuk Naban atau hubungan dia dengan LH-AG tidak terangkum dalam konteks k 5(a) (lihat perenggan 8).

(2) Keputusan defendan-defendan untuk menyingkirkan plaintif daripada perkongsian bermula daripada tuduhan-tuduhan yang dibuat terhadap plaintif. Tuduhan-tuduhan ini menjadi asas kepada tindakan defendan-defendan. Adalah munasabah untuk mengandaikan bahawa tindakan terhadap plaintif tidak akan diambil melainkan defendan-defendan telah berpuas hati terhadap kebenaran tuduhan-tuduhan terhadap plaintif. Adalah munasabah untuk mengandaikan bahawa tindakan defendan-defendan terhadap plaintif adalah akibat daripada nasihat yang diberikan kepada mereka oleh LH-AG. Fakta-fakta yang mana tindakan diambil ke atas plaintif oleh defendan-defendan merupakan fakta material dan fakta-fakta ini yang dipertikaikan (lihat perenggan 10).

(3) Hasil daripada keputusan mesyuarat dan perbincangan antara plaintif dan Datuk Naban dan dengan memberikan nasihat 'friendly' bahawa plaintif seharusnya meninggalkan KPMG, Datuk Naban telah menunjukkan pendiriannya ke atas kedua-dua tuduhan yang dibuat dan kedudukan plaintif dalam KPMG. Daripada tindakannya, Datuk Naban telah terlibat secara peribadi dan dia telah menjadi saksi terhadap material dan fakta-fakta yang dipertikaikan (lihat perenggan 13).

(4) Tidak dapat diendahkan bahawa Datuk Naban merupakan rakan kongsi kanan dalam LH-AG, iaitu kedudukan yang tinggi dalam hierarki organisasi LH-AG. Encik Lim, Encik Lambert Rasa-Ratnam dan Encik Sean Yeow merupakan rakan-rakan kongsi firma tersebut. Retainer ialah LH-AG, bukannya Encik Lambert Rasa-Ratnam dan/atau Encik Sean Yeow. Keakraban dan hubungan antara Datuk Naban dan peguam-peguam dalam LH-AG oleh itu menimbulkan keadaan kepentingan bercanggah (lihat perenggan 14).]

Notes

For a case on conflict of interest, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1584.

Cases referred to

Afkos Industries Pty Ltd v Pullinger Stewart (a firm) (2001) WASC 69 (refd)

Lee Kam Sun v Ho Sau Lin & Anor [1999] 4 MLJ 509; [1996] 4 CLJ 507, HC (refd)

Paruvathy a/p Palany v Sathiasealan a/l Govindasamy [1999] 5 MLJ 151; [1999] 6 CLJ 113, HC (refd)

PP v Vengadasalam & Ors [1990] 1 MLJ 507; [1990] 2 CLJ (Rep) 893, HC (refd)

R v Secretary of State for India In Council & Ors, ex p Ezekiel [1941] KB 169; [1941] 2 All ER 546, KBD (refd)

Shankar RP Asnani v Stanley Eddy [2004] 2 CLJ 604, HC (refd)

Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak [1997] 5 MLJ 705; [1997] 3 CLJ 754, HC (refd)

Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors [2007] 3 MLJ 305; [2007] 3 CLJ 230, CA (refd)

Wee Choo Keong v Pendakwa Raya [1990] 2 MLJ 239, HC (refd)

Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 3 MLJ 679; [1993] 4 CLJ 345, SC (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 5(a), 28(a)

James Culaz (Culaz & Associates) for the plaintiff.

Lambert Rasa-Ratnam (Sean Yeow Huang-Meng with him) (Lee Hishamuddin Allen & Gledhill) for the defendants.

Aziah Ali J:

[1] The plaintiff filed an application vide encl 5 to disqualify Messrs Lee Hishammuddin Allen & Gledhill (LH-AG) from acting for the defendants in this action. The plaintiff prays for the following:

(1) an order that Messrs Lee Hishammuddin Allen & Gledhill be disqualified from acting as solicitors for defendants; and

(2) that costs of this application be borne by the defendants.

[2] The plaintiff was at all material times, a partner in the firm known as KPMG. The plaintiff instituted this action against the defendants for unlawfully and illegally excluding the plaintiff from the partnership of KPMG. The action taken by the defendants against the plaintiff stemmed from an allegation of sexual misconduct made by one female employee of the defendants against the plaintiff. LH-AG advised the defendants in this matter. The plaintiff alleges that the procedures, acts and conduct undertaken by the defendants in removing him from the partnership is unlawful and illegal. After considering the various affidavits and hearing submissions, I allowed the application. The defendants now appeal against this decision.

[3] Briefly the reasons put forward by the plaintiff for the application are that the firm of LH-AG has been fully involved in all processes leading to the exclusion of the plaintiff. A lawyer from LH-AG identified as Mr Lim Heng Seng, a partner in LH-AG, was present during the defendants' executive committee ('EXCO') meeting attended by the plaintiff and his counsel where the allegations made against the plaintiff were raised and the plaintiff was asked to respond. The EXCO subsequently made a decision regarding the plaintiff's position in the defendants' firm (see the plaintiff's affidavit encl 4 para 3 and the defendants' affidavit encl 6 para 8.3).

[4] The plaintiff says he was instructed by the third defendant to meet Datuk Naban, a senior partner in LH-AG. At this meeting, the plaintiff says Datuk Naban told him that he has no chance against the defendants' firm. According to the plaintiff, Datuk Naban had told the plaintiff to leave the defendants' firm. In the words of the plaintiff, Datuk Naban had told him 'to pack his bags and leave' (see the plaintiff's affidavit encl 4 paras 4 and 5 and encl 6 para 24).

[5] The plaintiff says that these acts show that LH-AG and Datuk Naban have clearly formed an opinion as to the allegations made against him even

before an inquiry had been commenced against the plaintiff. The plaintiff avers that by these acts, the lawyers of LH-AG and Datuk Naban and other members of LH-AG are material witnesses in the plaintiff's suit against the defendants and a conflict of interest situation will arise (see encl 4 paras 8, 10 and 11). Counsel for the plaintiff further submits that by making it known to the plaintiff their stand in respect of the plaintiff's position in the partnership of KPMG, the lawyers from the firm of LH-AG are not independent and are in breach of their duty not only to the court but also to their client. The plaintiff says that the acts or omissions of LH-AG and the actions taken by the defendants which are at the heart of the question in issue, were based on the advice given by LH-AG. According to the plaintiff, in the real sense, LH-AG is defending its action or advice. Therefore, LH-AG should be disqualified from acting for the defendants. The plaintiff says the defendants will not be represented with the objectivity and independence which they are entitled to as to the court demands. This failure will compromise the integrity of the judicial process. The plaintiff's counsel submits that LH-AG are caught by the provisions of rr 5(a) and 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 (the 1978 Rules). Counsel refers to, among others, the cases of *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705; [1997] 3 CLJ 754, *Afkos Industries Pty Ltd v Pullinger Stewart (a firm)* (2001) WASC 69, *Paruvathy a/p Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151; [1999] 6 CLJ 113 and *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509; [1999] 4 CLJ 507.

[6] Counsel for the defendants submit that the courts are always slow to interfere with the right that a party has to be represented by counsel of his choice and a strong case must be made out before counsel is prevented from acting. The mere fact that the plaintiff asserts that the defendant's counsel will be a witness is not by itself sufficient for disqualification (*Public Prosecutor v Vengadasalam & Ors* [1990] 1 MLJ 507; [1990] 2 CLJ (Rep) 893, *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679; [1993] 4 CLJ 345).

[7] With regard to r 5 of the 1978 Rules, according to counsel for the defendants, r 5 (b) clarifies the situations that r 5 (a) is intended to cover. According to counsel, in this case, LH-AG had never advised or acted for the plaintiff, whether in this matter or in another matter (*Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors* [2007] 3 MLJ 305; [2007] 3 CLJ 230).

[8] Rule 5 of the Legal Profession (Practice and Etiquette) Rules 1978 provides as follows:

5 No advocate and solicitor to accept brief if difficult to maintain professional independence.

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

(b)(i) An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.

(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

The affidavits show that the plaintiff's association with Datuk Naban and LH-AG is strictly on a professional basis. The plaintiff himself says that he has a cordial, close working relationship with Datuk Naban. There is no evidence to suggest that there exists between the plaintiff and Datuk Naban or between the plaintiff and LH-AG the situation as envisaged by r 5(b). Therefore in my opinion, the nature of the cordial, albeit close, working relationship between the plaintiff and Datuk Naban or his relationship with LH-AG does not fall within the context of r 5(a). On this issue, I agree with the defendants' counsel's submissions that r 5(a) does not apply in this case.

[9] With regard to r 28(a), the defendants do not deny the involvement of Mr Lim Heng Seng in the EXCO meeting (see encl 7 para 4). Neither do they deny the meeting between the plaintiff and Datuk Naban. What Datuk Naban told the plaintiff is not disputed (see para 3.8 of defendants' written submissions marked 'B'). However, counsel for the defendants submits that the sole issue is whether the plaintiff was wrongfully excluded from the partnership of KPMG. Therefore what Datuk Naban may or may not have told the plaintiff, and the opinion of Datuk Naban is wholly irrelevant; Datuk Naban is not a material witness to any disputed question of fact. Similarly, it is submitted that the opinion of LH-AG is completely irrelevant. It is not denied that LH-AG advised the defendants (see defendants' written submissions marked 'B' at para 3.3 and 3.4). However, counsel submits that at all material times, LH-AG acted as solicitors for KPMG, not the plaintiff. The plaintiff was never a client of KPMG. There is no rule that a solicitor that had advised a party prior to a legal proceeding cannot continue to act for that party in subsequent legal proceedings. Counsel further submits that counsel appearing in this case is not Datuk Naban but Mr Lambert Rasa-Ratnam and Mr Sean Yeow. It is submitted that even if Datuk Naban could act, it does not mean that another counsel from LH-AG cannot act (*Shankar RP Asnani v Stanley Eddy* [2004] 2 CLJ 604).

[10] I agree with the defendants' counsel that the issue in the plaintiff's action is whether the plaintiff was wrongfully excluded from the partnership of KPMG. However, it is also apparent that the defendants' decision to exclude the plaintiff from the partnership arises out of allegations made against the plaintiff. These allegations formed the basis for the defendants' action. It is reasonable to presume that the action against the plaintiff reflects the advice given to the by LH-AG. The facts upon which action was taken against the plaintiff by the defendants are material facts and these are disputed facts. The plaintiff contends that the allegations are not true (see para 8.3 (i) of encl 6).

[11] Rule 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 provides as follows:

28 Advocate and solicitor not appear in a case where he is a witness.

(a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interest.

(b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.

(c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in a matter in which he acts or appears.

In the case of *Sykt Pengangkutan Sakti Sdn Bhd* Abdul Malik Ishak J (as he was then) in his judgment referred to the case of *Public Prosecutor v Vengadasalam & Ors* [1990] 1 MLJ 507 which was decided by Lim Beng Choon J where His Lordship had said as follows:

> It is undesirable for an advocate to appear as a counsel in a trial when he is required to be a material witness. If an advocate, knowing that he is going to be a material witness, insists on appearing as counsel in the case, the presiding court has the jurisdiction to take the appropriate action in the interest of justice to ensure the fair and orderly conduct of the trial.

Lim Beng Choon J after reviewing certain Indian authorities had this to say at p 512 of the report:

> Although I have lifted the injunctive order restraining Mr SP Annamalai from defending the three accused persons, nevertheless, perhaps learned counsel would like to reconsider whether it would be wise for him to continue to defend his clients. Should it turn out that, in the midst of testifying, his evidence is quite

material, he would have to retire and his clients would be left in the lurch, and what is worse is that he may find himself open to a charge of misconduct.

Abdul Malik Ishak J also referred to the judgment of Wan Yahya J in the case of *Wee Choo Keong v Pendakwa Raya* [1990] 2 MLJ 239 as follows:

> Wan Yahya J (who later rose as FCJ) watered down the rigours of r 28 of the Legal Profession (Practice and Etiquette) Rules 1978 in *Wee Choo Keong v Pendakwa Raya* [1990] 2 MLJ 239. This was what His Lordship said:
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> > This section to my mind does not envisage that an advocate and solicitor is ipso facto excluded from appearing as such in court, the moment he believes that he will be a witness. This ethical restriction will only arise if he is likely to be a witness of any material or disputed fact.

The facts in the case of *Sykt Pengangkutan Sakti Sdn Bhd* briefly show that the plaintiff sent a motor van JCY 5932 for repairs at the defendant's workshop. There was a delay in repairing the motorvan. The plaintiff wanted to take the motorvan from the defendant's workshop but the defendant refused to accede unless the plaintiff settles RM1,267. The plaintiff engaged Mr Gana Muthusamy, an advocate and solicitor. He proceeded to the defendant's workshop and spoke to the defendant and tried to persuade the latter to release the motorvan belonging to the plaintiff with an undertaking by the plaintiff to settle all charges payable to the workshop but without prejudice to the right of the plaintiff to litigate the matter in a court of law. The trip to the defendant's workshop proved futile. Mr Gana Muthusamy then issued a notice to the defendant demanding the release of the motorvan within three days failing which the matter would be referred to the court. Learned counsel for the defendant raised a preliminary objection to the effect that the law firm of M/s Gana Muthusamy & Co should not appear on record as solicitors for the plaintiff since Mr Gana Muthusamy would be called as a witness by the defendant. Counsel for the defendant also argued that only Mr Gana Muthusamy ought not to appear for the plaintiff but the law firm as a whole including the legal assistants of M/s Gana Muthusamy & Co, should appear nor act for the plaintiff in the present case — be it in the chambers or in open court.

In his judgment, Abdul Malik Ishak J said, inter alia, as follows:

> As I see it the preliminary objections can be divided into three parts. The first part would be barring Mr Gana Muthusamy from representing the plaintiff be it in chambers or in open court in the present case as he would be called as a witness by the defendant. The second part would bar the law firm of M/s Gana Muthusamy & Co, to appear on record as solicitors for the plaintiff in the present case. The third part would bar the legal assistants of the law firm of Messrs Gana Muthusamy & Co, from appearing or acting for the plaintiff be it in chambers or in open court in the present case.

Abdul Malik Ishak J then said as follows:

> In my judgment, when Mr Gana Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing he became a witness on these material and disputed questions of facts. By virtue of r 28(a) of the Legal Profession (Practice and Etiquette) Rules, Mr Gana Muthusamy should be barred from representing the plaintiff be it in open court or in chambers. There are no concessions to be offered. The rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this august profession. The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right. There is a passage appearing in the judgment of Humphreys J in *R v Secretary of State for India In Council & Ors, ex p Ezekiel* [1941] KBD 546 that merits reproduction. It is this:
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> There is a short observation which the other members of the court desire me to make and with which I agree. It has been brought to the attention of the court that, on the hearing at Bow Street, junior counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as counsel in the case. No objection was taken to this by counsel on the other side. We think it right to point out that this was irregular and contrary to practice. A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as both counsel and witness in the same case.

[12] In the case of *Paruvathy a/p Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151; [1999] 6 CLJ 113 which was also a decision by Abdul Malik Ishak J, preliminary objections arose because counsel in that case, Mr T Rajagopalu deposed an affidavit which was filed purportedly to negate the plaintiff's averments. The plaintiff prayed that Mr T Rajagopalu be barred from representing the defendant. Counsel for the defendant submitted that the plaintiff has yet to file an application to cross-examine Mr T Rajagopalu and the issue of whether the latter would become a witness was irrelevant. His Lordship said, inter alia, as follows:

> Mr T Rajagopalu is personally involved in the whole episode. There would be every possibility that Mr T Rajagopalu might be cross-examined on his affidavit, a prerogative of the plaintiff and exercisable by her at any time.

His Lordship also said:

> Mr T Rajagopalu may end up as a witness for the defendant and he would find himself caught under r 28(a) of the Legal Profession (Practice and Etiquette) Rules1978 which states that an advocate and solicitor shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness

A in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interest.

His Lordship further said:

B Mr T Rajagopalu's status as counsel for the defendant would immediately change once the plaintiff seeks to cross-examine him in the witness-box. Must this court wait for that to happen? Certainly not. For the reasons adumbrated above, I allowed the plaintiff's preliminary objections with costs.

C **[13]** On the issue of r 28(a), I considered the meeting between Datuk Naban and the plaintiff. I also take note that Datuk Naban spoke to the plaintiff as a friend (see encl 6 para 24.4). By giving the 'friendly' advice that the plaintiff should leave KPMG, Datuk Naban made known his stand as to D both the allegations made and the plaintiff's position in KPMG. In these circumstances and at the risk of repetition, I refer to what Abdul Malik Ishak J said in the case of *Sykt Pengangkutan Sakti Sdn Bhd* where on the facts of that case, His Lordship said '... When Mr Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing, he became a witness on material and E disputed questions of fact. By virtue of r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr Muthusamy should be barred from representing the plaintiff, be it in open court or in chambers, as he should not be allowed to be a witness for the defendant and counsel for the plaintiff at the same time'. In the present case, I am of the opinion that as a result of the F meeting and discussion between the plaintiff and Datuk Naban and his advice to the plaintiff, by his act, Datuk Naban became personally involved and he is likely to be a witness of material and disputed facts.

[14] The next issue is whether even if Datuk Naban cannot act, can the G other lawyers of LH-AG act for the defendants? Counsel submits that counsel in this case is not Datuk Naban but Mr Lambert Rasa-Ratnam and Mr Sean Yeow. Though this may be the case, I cannot ignore the fact that Datuk Naban is a senior partner in LH-AG, a position that is high in LH-AG's organisational hierarchy. Mr Lim Heng Seng, Mr Lambert H Rasa-Ratnam and Mr Sean Yeow are partners. The retainer here is LH-AG, not Mr Lambert Rasa-Ratnam and/or Mr Sean Yeow. The proximity and relationship between Datuk Naban and counsel in LH-AG raises a conflict of interest situation (see *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509; [1999] 4 CLJ 507). As Abdul Malik Ishak J had said in *Sykt Pengangkutan* I *Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak*:

... To allow the plaintiff's counsel or his legal assistant to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of clear words in s 94(3)(n) and (o) of the Legal Profession Act 1976. As advocates and solicitors, they should have due regard to their client's

> interests and must conduct themselves with decorum so as not to bring the legal profession into disrepute... The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right (*R v Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] KBD 546).

I also refer to what Lim Beng Choon J had said in *Public Prosecutor v Vengadasalam & Ors* '... the presiding court has the jurisdiction to take the appropriate action in the interest of justice to ensure the fair and orderly conduct of the trial'. For the above reasons I therefore allowed the plaintiff's application with costs.

Plaintiff's application allowed with costs.

Reported by Ashgar Ali Ali Mohamed